Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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April 20, 1977

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JURISDICTIONAL STATEMENT

This is an appeal from the criminal conviction of the publisher of a newspaper arising out of its publication of a news article accurately reporting the fact that a particular judge had been the subject of an investigation and hearing by the Virginia Judicial Inquiry and Review Commission.* Appellant is Landmark Communications, Inc. ("Landmark"), the publisher of *The Virginian-Pilot*, a newspaper of general circulation in Tidewater, Virginia. The appeal is from the decision of the Virginia Supreme Court entered on March 4, 1977 affirming, by a 6-1 vote, the conviction of Landmark and upholding the constitutionality of Va. Code § 2.1-37.13 as applied to Landmark. This Jurisdictional Statement is submitted to demonstrate that this Court has jurisdiction of this appeal and that substantial constitutional questions meriting review by the Court are presented.

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* The article is set forth in the Appendix at p. 31a.

Opinions Below

The opinion of the Virginia Supreme Court dated March 4, 1977 is set forth in the Appendix at p. 1a and is not yet reported. The order of the trial court dated January 15, 1976, finding Landmark guilty as charged and imposing a fine of $500 is set forth in the Appendix at p. 21a and is unreported.

Jurisdiction

On November 5, 1975, a grand jury in the Circuit Court of the City of Norfolk, Virginia returned a true bill indicting Landmark for having "unlawfully divulge[d]", in violation of Va. Code § 2.1-37.13, "the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." (JA 2)* Landmark moved to quash and dismiss the indictment alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that it could only be applied to Landmark in violation of the First Amendment to the United States Constitution. (JA 3) On December 10, 1975, the trial court overruled Landmark's motion to quash and dismiss the indictment (JA 64) and Landmark was tried before the court sitting without a jury. On January 15, 1976, the trial court found Landmark guilty as charged. (JA 65) On January 29, 1976, Landmark filed its Notice of Appeal and Assignments of Error alleging, *inter alia*, that Va. Code § 2.1-37.13 did not apply to Landmark's published article and that said section could only be applied to Landmark

*References to "JA—" are to the appropriate pages of the Joint Appendix filed with the Supreme Court of Virginia; references to "—a" are to the appropriate pages of the Appendix to this Jurisdictional Statement.

in violation of the First Amendment to the United States Constitution. (JA 69) On March 4, 1977, the Supreme Court of Virginia rendered its decision affirming Landmark's criminal conviction and rejecting its constitutional arguments. A Notice of Appeal was filed on April 15, 1977, a copy of which is set forth at p. 34a of the Appendix.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by Title 28, U.S.C. Section 1257(2).

Questions Presented

(1) May a newspaper, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming *arguendo* that a newspaper may ever be convicted and subjected to criminal sanctions for such conduct, may it, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Va. Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Va. Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.
>
> "If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature and rules relating to the Virginia Judicial Inquiry and Review Commission.* Section 2.1-37.13 provides, in relevant part, as follows:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§2.1-37.11 ["Order compelling witness to attend and testify"], 2.1-37.12 ["Depositions"]), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Virginia Code.

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* The complete text of the Virginia statutes relating to the Commission is set forth as Appendix C to this Jurisdictional Statement at pages 22a-30a.

Pursuant to Va. Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

Statement of the Case

On October 4, 1975, *The Virginian-Pilot*, a newspaper published by Landmark, printed on the first page of its second section an article which accurately identified and reported on a judge who had been investigated by the Virginia Judicial Inquiry and Review Commission (the "Commission"). The article stated that "[n]o formal complaint has been filed by the commission" against the judge, "indicating either that the five-man panel found insufficient cause for action or that the case is still under review." (31a)

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for the publication of the October 4 article. The Grand Jury charged that Landmark "did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission. (JA 2)

Trial was had on December 10, 1975, after the denial by the trial court of Landmark's motion to quash and dismiss the indictment. (JA 64) The only evidence introduced by the Commonwealth (other than the charter, articles of amendment, and last annual report of Landmark) was a Stipulation of Evidence stating that Landmark was a Virginia corporation which publishes *The Virginian-Pilot*; that on October 4, 1975, Landmark published an article which identified a judge who had been investigated by the Commission; and that at the time of the publication of the article the Commission had not filed a formal complaint

concerning the judge with the Supreme Court of Virginia. (JA 6-7)

The only witness who testified at the trial was Mr. Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*. He testified, on behalf of Landmark, that he made the decision to publish the article because (1) a complaint had been filed against the judge many months prior to the hearing before the Commission and (2) the news was of such importance that it should be brought to the attention of the public. (JA 55) Mr. Dunn stated that he was aware that it was a misdemeanor for individuals who participated in the proceedings before the Commission to reveal information concerning the proceedings, but that he had not understood the statute to apply to newspaper reports about proceedings before the Commission. (JA 55-56) He further testified that no reporter, employee or agent of Landmark had been subpoenaed before or otherwise participated in the proceedings before the Commission. (JA 56)

On January 15, 1976, the trial court found Landmark guilty as charged. Its Order did not deal with, or even refer to, the statutory and constitutional arguments made by Landmark. Instead, the Order simply concluded that "the Court doth find the defendant Guilty as charged", fixing punishment at $500 and requiring Landmark to pay the costs of prosecution. (JA 65-66)

The decision of the Supreme Court of Virginia affirming the conviction of Landmark by a 6-1 vote, characterized the case as involving "a confrontation between the First Amendment guaranty of freedom of the press" and § 2.1-37.13. (1a) After rejecting Landmark's contention that the statute did not cover it and holding that the statute "[c]learly" applied to Landmark, the Court dealt with the direct confrontation between the statute as so interpreted

and the First Amendment, acknowledging that the matter was "serious" and "important" and that it presented "an issue not decided previously by this Court or, so far as our research discloses, by any other appellate court in this country." (5a-6a)

Viewing the case as one involving "subsequent punishment" rather than prior restraint (8a)—a conclusion with which we do not quarrel on this appeal—the Court purported to apply a clear and present danger test in the following fashion: it conceded that Landmark could not be punished for "publishing the confidential information contained in the article" unless the revelation created "a clear and present danger to . . . the orderly administration of justice"; it held that the statute itself, one of 35 in the nation requiring confidentiality with respect to judicial inquiry commissions*, constituted an appropriate finding of such a danger; and it conceded that no evidence had been adduced at trial that publication of the October 4, 1975 news article in *The Virginian-Pilot* constituted a clear and present danger to the administration of justice. The "requirement of confidentiality in Commission proceedings," the Court held:

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by pro-

* The number was based on information set forth in the publication of the American Judicature Society entitled *Judicial Disability and Removal Commissions, Courts and Procedures* (1973). As of the writing of this Jurisdictional Statement, over 40 jurisdictions have adopted review procedures.

> hibiting disclosure of their identity prior to a determination that the complaint is meritorious." (18a)

Concluding that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings" (18a), the Court upheld the statute's constitutionality and affirmed the conviction.

Justice Poff dissented, concluding that the statute "should be construed not to apply to this defendant under these circumstances" and that "[c]onstrued otherwise, the statute offends the First Amendment." (19a)

On April 15, 1977, Landmark filed a Notice of Appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

The substantiality of the federal questions raised by this appeal may perhaps be demonstrated most simply by reference to the language of the opinion of the Supreme Court of Virginia itself. Later events in Virginia relating to the statute in question underscore still further the significance of the matters in dispute.

The opinion of the Virginia Supreme Court recognizes its signal importance, its potential precedential impact on the many other states which require confidentiality of proceedings before judicial inquiry commissions and the fact that the opinion is the first dealing with such a statute to face the "confrontation" between the statute and the First Amendment. The result reached by the opinion is to affirm a finding of criminal liability on the part of a publisher for truthfully printing news about public officials

with respect to their performance of their public duties, notwithstanding the prior holding of this Court in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). The opinion does so in the name of a "clear and present danger" to the administration of justice test, notwithstanding the fact that in the four cases this Court has thus far considered in which such a claim has been made, it has been rejected. *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962). On such a basis alone, we believe this appeal warrants this Court's consideration.

Moreover, only 8 days after the decision of the Virginia Supreme Court, the United States District Court for the Eastern District of Virginia, in an Order entered by Judge Robert R. Merhige Jr., issued a temporary injunction restraining prosecution of a Virginia television station under the same section of Virginia law as that involved here. *Nationwide Communications, Inc.* v. *Backus* (C.A. No. 77-0139-R) (March 15, 1977). That order (a copy of which is set forth at p. 33a of the Appendix) has since expired;* its issuance after argument on the constitutional merits of the case itself raises serious questions as to the correctness of the decision of the Virginia Supreme Court and suggests the desirability of review by this Court of the correctness of the ruling in this action.**

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* According to press reports, Richmond television station WXEX, which is owned by Nationwide Communications, Inc. and which had broadcast the name of a judge under investigation by the Judicial Inquiry and Review Commission, abandoned its action due to the pendency of this appeal. *Richmond Times-Dispatch*, March 25, 1977, p. B8.

** On March 31, 1977, Richmond Newspapers, Inc., the publisher of the *Richmond Times-Dispatch* and the *Richmond News Leader*, was charged by the Commonwealth with violating Va. Code § 2.1-37.13. A motion for a temporary restraining order against the prosecution was denied on April 5, 1977 by United States District Judge D. Dortch Warriner, who stated that although he believed the statute was unconstitutional, he could not find the statute "patently and flagrantly unconstitutional" in light of the decision of the Supreme Court of Virginia. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

I. *The Improper Imposition of Criminal Sanctions for the Publication of Truthful Statements About a Public Official Concerning Public Duties*

This case raises anew a question which penetrates to the core of our concept of self-government. It is nothing less than whether the press may be punished for printing the truth about a public official in connection with his public duties.

It is an old question—dating back to the Zenger trial itself—and it is one we believe this Court has long since answered. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court unanimously struck down a conviction under a Louisiana criminal libel law resulting from intemperate criticism of the judiciary. The Court's opinion emphasized that:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan*, 376 U.S., at 270." (379 U.S. at 74-75).

Recognizing the fundamental values at stake, the Court set forth with precision the precept which we believe governs here:

"Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." • (379 U.S. at 74)

This proposition has been reaffirmed recently in a very different context, one which—if anything—has historically been accorded far less First Amendment protection. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court noted, in the context of speech concerned largely with commercial matters, rather than purely governmental affairs, that the state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." (*Id.* at 773.)••

Yet that is precisely what Va. Code § 2.1-37.13, as authoritatively interpreted by the Virginia Supreme Court, seeks to do. Pursuant to the decision, journalists or publishers could be fined or imprisoned if they ever printed the fact that an unfit judge who had been accused before the Commission was still sitting, or that an unfit—or corrupt—Commission had covered up for the judge. And, as in this case, the mere accurate reference in a news article

• More recent decisions concluding that civil libel laws may not be used by a public official or public figure to recover damages arising from the publication of true statements about him include *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 498-500 (1975) (Powell, J., concurring) and *Time, Inc.* v. *Firestone*, 424 U.S. 448, 458 (1976).

•• On two occasions within the last several years, this Court has been presented with cases which raised questions relating to the ability of government, acting civilly or criminally, to punish the press for publishing information obtained in connection with public judicial proceedings. In both *Cox Broadcasting Corp.* v. *Cohn*, *supra*, and *Oklahoma Publishing Co.* v. *District Court*, 97 S.Ct. 430 (1976), this Court refused to allow the states to abridge the freedom to publish.

to the name of a sitting judge against whom charges had been filed would be criminal—notwithstanding the recent admonition in Justice Brennan's concurring opinion in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) that:

"Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

The decision of the Supreme Court of Virginia is based upon the interest in assuring the high quality of the judiciary by permitting society to retire, censure or remove disabled or unfit judges. That such an interest exists and that it is significant we do not doubt: Chief Judge Traynor's admonition is telling "that in the judiciary, as in every other walk of life, a bad man is as hard to lose as a good man is hard to find." • Nor do we doubt that some "bad men" may be easier lost to the judiciary if there are no leaks from the Commission; but it may also be that the publication of such information will expose unfit judges and unfit commissions. The First Amendment,

• Traynor, *Who Can Best Judge the Judge?*, 42 Cal. State Bar J. 225, 238 (1967).

we submit, has made a choice for tension between government and the press in precisely such situations—and complete press freedom to publish the truth as it learns it. As phrased by the late Alexander Bickel:

> "[G]overnment may guard mightily against serious but more ordinary leaks, and yet must suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress." (A. Bickel, *The Morality of Consent* 80 (1975))

Precisely the same, we believe, may be said of this case. The Commission may withhold and keep secret what it can; the press may print what it learns.* See generally, Stewart, *"Or of the Press"*, 26 Hastings L. Rev. 631 (1976). To the extent Va. Code § 2.1-37.13 is read to the contrary, as it was by the Supreme Court of Virginia, it is unconstitutional.

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* We recognize, as did Professor Bickel, the limitations on this principle which may arise in the unique circumstances discussed in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Issues of national security are so far removed from the present context that we believe they need not be considered here.

II. *The Improper Imposition of Criminal Sanctions on the Press for its Publication in the Absence of Factual Proof Adduced in Evidence of a Clear and Present Danger to the Administration of Justice*

Assuming *arguendo* that the publication of truthful statements about public officials in connection with their public duties may ever result in the imposition of criminal sanctions, we submit that there can be no constitutionally satisfactory basis for imposition of such sanctions in this case.

On four separate occasions this Court has come to consider the claim that the interests of the administration of justice required that free expression with respect to the conduct of the judiciary be subjected to criminal sanctions. In each of those cases—*Bridges, Pennekamp, Craig* and *Wood*—this Court held the expression involved to be constitutionally protected.*

The statements at issue in this case published by *The Virginian-Pilot* are acknowledged in the indictment itself to be true. They are, as it happens, not even critical of the judge in question—concluding that the Commission had apparently found "insufficient cause for action or that

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* The language at issue about the judiciary in those cases was in many respects offensive and in some untrue. The editorials at issue in *Bridges* (entitled "Probation for Gorillas?") all but demanded that probation not be granted to two union members who had been found guilty of assault (314 U.S. at 271-72); the cartoon and editorials at issue in *Pennekamp* "wondered"—in a fashion which this Court agreed was unfair—whether the courts were being "subverted into refuges for lawbreakers" (328 U.S. at 337n); the editorials in *Craig*, during the pendency of a motion for a new trial, accused the elected layman judge of "arbitrary action" and of committing a "travesty on justice" in his earlier rulings which he was then reconsidering (331 U.S. at 379-80); and the offending language in *Wood* accused a judge of charging a then sitting grand jury "in the style and language of a race baiting candidate for political office." (370 U.S. at 380) All these cases involved the articulation of harsh opinion about the judiciary—not, as in this case, the statement of uncontestedly accurate facts.

the case is still under review." (31a) Yet it is the position of the Commonwealth—and now its Supreme Court—that the publication of such a news article may lead to criminal sanctions for the publisher in the interest of preserving the confidentiality of the judge under investigation. This, in turn, is justified on the grounds that the "reputation" of the judge might otherwise be injured and that "public confidence" in the judiciary might be otherwise diminished.*

As to these matters, the language of *Bridges* is still apt: in response to the similar concerns of "disrespect for the judiciary" and "disorderly and unfair administration of justice", this Court concluded that:

> "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." (314 U.S. at 270-71)

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* The only other interest cited by the Virginia Supreme Court to demonstrate the purposes served by confidentiality is the protection of complainants from judicial recriminations. This is not, strictly speaking, relevant to this case since Landmark's conviction relates only to the divulgence of the name of an accused judge. For reasons similar to those set forth in the text, however, we would urge, as well, that the First and Fourteenth Amendments do not permit the imposition for this reason of criminal punishment upon the press for its truthful reporting. We note also that this interest, in any event, is ill-served by a statute which prohibits the press from reporting on judicial misconduct—or indeed harassment of the complainants—but does not prohibit the judge from learning information which may well identify the complainants. Where, as here, the dynamics of the process effectively prevent any assurance of complete anonymity of complainants even in the absence of press reporting, the Virginia legislature should not be free to impose sanctions on the press in a bootless effort to achieve that which it cannot do. *See Nebraska Press Ass'n* v. *Stuart, supra*, 427 U.S. at 565-567.

There is still a further issue with respect to any application of the clear and present danger test to this case.* At the very least, application of that test has always required proof of *actual facts* that the expression in question created a danger of such immediate and grave magnitude that it could be punished. "[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges* at 262. This Court in *Craig* left no doubt concerning the standards:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." (331 U.S. at 376)

By no interpretation can the Commonwealth's evidence be deemed to establish by actual facts that the publication of the judge's name and the fact he had been investigated constituted a clear and present danger to the administration of justice, which danger was substantial, immediate and imminent. Indeed, the opinion of the Virginia Supreme Court concedes as much. (11a)

In this Court's scathing denunciation of the state's failure to produce evidence and the trial court's failure to make any findings or to give any reasons *how* the statements in *Wood actually* interfered with the administration of justice, the Court stated:

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* The conclusion of the Supreme Court of Virginia of the existence of a clear and present danger is in no sense binding on the Court. Precisely such a conclusion was rejected by this Court, in the strongest terms, in *Wood*. More recently, this Court has overruled such findings of state supreme courts in *Nebraska Press Ass'n* v. *Stuart, supra* and *City of Madison* v. *Wisconsin Employment Relations Commission*, 97 S.Ct. 421 (1976).

"Despite its conclusion that the petitioner's conduct created a serious evil to the fair administration of justice, the Court of Appeals did not cite or discuss the *Bridges, Pennekamp* or *Harney* cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger. It simply adopted as conclusions of law the allegations made in the contempt citation. The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion, this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion. There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure. . . . What interference to petitioner's hearing or what harm this assertion might inflict on the administration of justice is not stated in the opinion. Nor is there any evidence of either in the record.

"Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us." (370 U.S. at 386-88)

The same questions asked by the Court in *Wood* may be asked of the Commonwealth in the instant case. Nowhere did the Commonwealth demonstrate *how* the publication interfered with the administration of justice. As in *Wood*, no prosecution witnesses were called to show how the functioning of any court or investigative body was or would be disturbed. In fact, here the Commonwealth called *no* witnesses at all. There was no showing that the Commission's proceedings were or would be in any fashion interfered with and, if so, how Landmark's conduct was responsible for the interference.

The holding of the Virginia Supreme Court as to the existence of a clear and present danger to the administration of justice caused by publication of Landmark's article is thus completely unsupported factually; it is also totally unsupported in the legislative history of the adoption of the statute at issue.

At the heart of the ruling of the Virginia Supreme Court is the conclusion that the Virginia legislature—as well as many other legislatures—found a clear and present danger to the administration of justice in the publication of articles such as are at issue here. In fact, there is absolutely nothing in the legislative history of the adoption of Va. Code § 2.1-37.13 which supports this conclusion. Nor does the Virginia Supreme Court cite to any portion of such history to support its conclusion.

There is, to be sure, the finding that proceedings shall be "confidential" and that the identity of accused judges shall not be "divulged" but there is not a word of legislative history to the effect that newspapers or others that learn of what has transpired in those proceedings may not disclose it. Thus, the repeated conclusion of the decision (13a-15a) that it is based upon "'the armor wrought by prior legislative deliberation'", *Bridges, supra*, 314 U.S.

at 261, is simply unsupported; there is no basis for concluding that the "deliberation" adverted to in *Bridges* occurred at all—at least as regards the imposition of criminal penalties upon newspapers for publishing what they learn of the proceedings of the Commission.*

Nor does the ruling below find support in the passage by other jurisdictions of what the Virginia Supreme Court refers to as "similar" statutes. In one sense, of course, it is plainly accurate to state that the statutes of the 34 other jurisdictions referred to by the Court are similar; in another, it is quite inaccurate. Of the other jurisdictions only *one*—Hawaii—makes it a crime to disclose any part of the proceedings held before the judicial inquiry commission.** Each of the other jurisdictions requires confidentiality; none of the others criminally punishes anyone, let alone the press, for breach of that confidentiality. Thus, the conclusion of the Supreme Court of Virginia as to the "indispensable" nature of criminal sanctions to enforce confidentiality is all but unsupported outside Virginia—as well as lacking support in the legislative history within Virginia.

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* Justice Frankfurter's dissenting opinion in *Craig* is noteworthy for its apparent rejection of the notion that legislative acts relating to supposed clear and present dangers to the administration of justice come to this Court more shielded from First Amendment challenge than do judicial rulings of contempt. *See* 331 U.S. at 384-85. Professor Emerson, as well, agrees that the *Bridges* line of cases would have been decided identically, even if they had arisen under criminal statutes. T. Emerson, *The System of Freedom of Expression* 456 (1970).

** Rule 16 of the Rules of Practice and Procedure of the Hawaii Commission for Judicial Qualification provides that:

> "[a]ny commission member or individual, including the individual making the charge, who divulges information concerning the charge prior to the certification [thereof] . . . shall be guilty of a felony. . . ."

No clear and present danger to the administration of justice conceivably sufficient to warrant the overriding of First Amendment rights has been demonstrated in this action.

III. *The Vagueness and Overbreadth of Va. Code § 2.1-37.13*

This Court has frequently indicated the special caution with which it views—and reads—statutes limiting freedom of expression. As the Court observed in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

See also Erznoznik v. *City of Jacksonville*, 422 U.S. 205, 217-218 (1975) ["Where First Amendment freedoms are at stake . . . precision of drafting and clarity of purpose are essential."]; *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). The constitutional test of definiteness is particularly strict in the case of a criminal statute such as Va. Code § 2.1-37.13. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Winters* v. *New York*, 333 U.S. 507, 515-16 (1948). And this Court has recently repeated that it takes "special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Marks* v. *United States*, 45 U.S.L.W. 4233, 4235 (U.S. March 1, 1977).

The application of Va. Code § 2.1-37.13 to the publication of *The Virginian-Pilot* on October 4, 1975 runs afoul of all these cautionary strictures. The statutory language provides that "[a]ll papers filed with and proceedings before the Commission . . . including the identification of

the subject judge as well as all testimony and other evidence . . . shall be confidential and shall not be divulged by any person to anyone except the Commission. . . ." The statute does not define the meaning of the word "divulge".

At trial, counsel for Landmark urged—based upon the definition contained in *Webster's Third International Dictionary* (1961)—that "divulge" concerned the first act of disclosure only and that information became public upon, and only upon, its first disclosure. (JA 13) The Commonwealth responded—based upon the definition in *Webster's Second College Edition*—that divulge meant "to make public." (JA 39) The decision of the Supreme Court of Virginia here at issue—relying upon *Black's Law Dictionary* (4th ed. 1951)—held that divulge meant "to disclose [information] or make it known." "Clearly", the Virginia Supreme Court ruled, Landmark violated the statute. (5a) But, as the conflict of the dictionaries suggests, the legal meaning of "divulge", let alone a discernible legislative intent to apply the statute to newspapers, is far less clear.*

For one thing, as we have previously discussed, there is *no* legislative history on point, save only a general intent that proceedings be "confidential". Indeed, when the Virginia legislature has previously intended to adopt a statute *prohibiting* newspapers from publishing material, it has done so with no vagueness at all. Va. Code § 53-322 thus provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals. Only the fact that the criminal was executed shall be printed or published." **

* Counsel for the Commonwealth even conceded that "there is a different interpretation or a different definition for that word—'to make public.'" (JA 39)

** We do not, of course, concede the constitutionality of that statute which we believe to be facially violative of the First and Fourteenth Amendments.

Moreover, not only is the dictionary definition of "divulge" in dispute: the cases indicate that statutes will not so easily be interpreted to make "divulge" and "publish" synonymous.*

The vagueness of the statute is hardly limited to the ambiguity of the word "divulge". On its face, the statute seems limited to disclosure of certain specified materials filed with or proceedings before the Commission.

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission. . . ."

The indictment and the scant record of this case do not indicate that the information allegedly "divulged" consisted of "papers filed with and proceedings before the Commission." Yet the Commonwealth's prosecution necessarily assumed that the statute, despite its specific and limited language, intended to include all matters pertain-

* In *United States* v. *Baltimore Post Co.*, 2 F.2d 761, 764 (D. Md. 1924), *aff'd*, 268 U.S. 388 (1925), for example, the word "publish" was held to mean "to make public"; it was held as well to mean something different from "to make known" or "to divulge." Closer to the present case, Judge Gurfein, in *New York Times Co.* v. *United States*, 328 F.Supp. 324 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971), held that in the absence of language explicitly barring "publication" as opposed to "communication" of particular materials relating to national defense, he would not read portions of the Espionage Act to permit the imposition of criminal sanctions with respect thereto. *See also*, *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 720 (Opinion of Douglas, J., concurring), 740 (Opinion of Marshall, J., concurring).

ing to a proceeding. The Virginia Supreme Court apparently agreed, holding that the statute

> "In unmistakable terms . . . states that *all information concerning a proceeding before the Commission,* including the identity of the judge who is the subject of the inquiry shall be confidential. . . ." (4a)

This interpretation allows affirmance of the conviction, but surely goes beyond the words of the statute. It presents a significant problem of fair notice and itself raises a question as to the sweep of "all information concerning a proceeding before the Commission." •

The vagueness of Va. Code § 2.1-37.13 as applied to Landmark thus results from several factors: it did not give "fair warning" that it applied to parties who obtain information after the initial disclosure by parties privy to the information; it gave no warning at all that its intended sweep encompassed the press; and it did not indicate that it applied to "all information concerning a proceeding" whether or not such information was obtained from material before the Commission. The First and Fourteenth Amendments do not permit criminal sanctions to be imposed upon the press under those circumstances.

As is often the case, unconstitutional overbreadth is a close relative of unconstitutional vagueness. Note, *The First*

• The interpretation offered by the Virginia Supreme Court still seems to leave in doubt a number of significant questions: Does it, for example, bar a newspaper from reprinting information previously published by other newspapers or news services? Does the statute prohibit a newspaper from reporting on open session of a house of the state legislature in which the reappointment of a judge investigated by the Commission was discussed?

Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970). Here what is involved is a statute which is neither "narrowly drawn" nor one which, at least as it is now said to relate to the press, represents "a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society". *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973). In an attempt to clarify such a statute, the Virginia Supreme Court has so extended the sweep of the statute as to catch up actions which, under any interpretation of the Constitution, are protected.

As interpreted by the Virginia Supreme Court, the statute at issue makes it a crime *ever* to identify a judge who is or has been investigated by the Commission, unless charges are publicly filed against him. Thus, if a newspaper believes some impropriety has prevented an incompetent judge from having formal charges filed against him, it could never print it, except at the risk of imposition of criminal sanctions. Similarly, if a complainant concluded that the Commission had improperly rejected a complaint filed by him, he could never express his views—at least if the judge's name or any detail relating to the proceedings at which the complainant testified is contained in his condemnation. That much, if not all, of such conduct is constitutionally protected seems evident. Thus, the statute is overbroad in proscribing acts "which may legitimately be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *see also United States* v. *Robel,* 389 U.S. 258, 265-66 (1967).

The unconstitutional overbreadth of the statute is demonstrated as well by the sweep of the conclusion of the Supreme Court of Virginia that what is "clearly" forbidden by the statute is the disclosure by "any person" to anyone else of "information" which is "still . . . confidential"—

e.g., information not contained in the public filing of a complaint in the Virginia Supreme Court by the Commission. Thus, readers of the article published in *The Virginian-Pilot* repeat what they read at their peril; one who hears from someone else what he heard from someone else about the identity of an accused judge repeats it at his peril; and the like. The Constitution does not permit such results.

CONCLUSION

The issues raised by this appeal relate to the heart of the First Amendment; news reporting and editorial comment concerning the administration of justice. In upholding the constitutionality of Va. Code § 2.1-37.13 as applied to Landmark and in affirming Landmark's conviction for publishing *The Virginian-Pilot* on October 4, 1975, the Supreme Court of Virginia ignored fundamental First Amendment principles. The questions presented by this appeal are indeed substantial and we urge this Court to note probable jurisdiction and set the case down for argument.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Virginia

OPINION BY JUSTICE HARRY L. CARRICO

Richmond, Virginia, March 4, 1977

Present: All the Justices

Record No. 760596

LANDMARK COMMUNICATIONS, INC.

v.

COMMONWEALTH OF VIRGINIA.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Alfred W. Whitehurst, Judge

The principal question in this case involves a confrontation between the First Amendment guaranty of freedom of the press and a Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission. A preliminary question is whether the appellant-newspaper is subject to the proscription of the statute.

Creation of the Judicial Inquiry and Review Commission was mandated by Article VI, Section 10 of the 1971 Constitution of Virginia for the purpose of investigating charges concerning disabled and unfit judges. The constitutional provision specifies that "[p]roceedings before the Commission shall be confidential."

The Commission was actually created by the General Assembly in 1971, at its session held to implement the new constitution. (1971 Va. Acts Spec. Sess. ch. 154; Va. Code §§ 2.1-37.1 *et seq.*) In the act creating the Commission, its powers and duties are outlined with detail. By the terms of Va. Code § 2.1-37.4, the Commission is empowered to investigate charges "which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution." If the Commission finds the charges well-founded and sufficient to constitute the basis for retirement, censure, or removal of a judge, it shall file a formal complaint with this court.[1] Virginia Code § 2.1-37.13[2] provides in pertinent part that

[1] Under Article VI, Section 10 of the Constitution, if this court finds the judge disabled to perform his duties, it shall retire him; if it finds he has engaged in misconduct while in office, it shall censure or remove him.

[2] "§ 2.1-37.13. *Confidentiality of papers and proceedings.*—
All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

"[a]ll papers filed with and proceedings before the Commission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." The Code section provides further that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."

The appellant, Landmark Communications, Inc., publishes *The Virginian-Pilot*, a newspaper of general circulation in the Tidewater area of Virginia. On October 4, 1975, the newspaper published an article stating that the Commission had conducted a "formal hearing concerning possible disciplinary action against" a judge, identified by name, of a court not of record in the City of Norfolk. The article recited further that the hearing "apparently stemmed from charges of incompetence against the . . . judge."

On November 5, 1975, Landmark was indicted for unlawfully divulging the identity of a judge who was "the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." Upon trial of the indictment by the court without a jury, it was stipulated that Landmark had published the article in question; that the Commission had investigated charges and conducted hearings concerning the judge named in the article; and that, at the time of the publication, the Commission had not filed a complaint with this court respecting the judge.[3] Landmark was convicted of the charge laid in the indictment, and it was fined the sum of $500.00.

[3] As of the date of this opinion, no complaint had been filed with this court concerning the judge in question.

On appeal, Landmark contends that it is unclear from a reading of Va. Code § 2.1-37.13 whether the statute's proscription against divulging information concerning a Commission proceeding applies not only to the participants in such a proceeding but also to a newspaper which publishes information obtained from one of the participants. Because the statute is penal in nature, Landmark argues, it must be strictly construed, and any doubt or ambiguity concerning its application must be resolved against the Commonwealth and in favor of one accused of its violation.

When the doubt or ambiguity in § 2.1-37.13 is so resolved, Landmark asserts, the statute should be construed to mean that a violation may occur only upon "the *first act of disclosure* . . . by an individual who had *actually participated* in some manner in the proceedings of [the] Commission." Under this construction and the circumstances of this case, Landmark concludes, the information concerning the judge in question "lost its confidentiality" and "became public upon its first disclosure" by a participant in the proceedings, and all Landmark did was to publish information "which was *voluntarily and freely* given to it."[4]

While we agree with Landmark that the statute must be construed strictly, we disagree with the remainder of its argument. We hold that Va. Code § 2.1-37.13 does not suffer the doubt or ambiguity asserted by Landmark.

In unmistakable terms, the statute states that all information concerning a proceeding before the Commission, including the identity of the judge who is the subject of the inquiry, shall be confidential and that this

[4] The record is silent, however, concerning the manner in which Landmark secured the information.

confidentiality shall continue until a formal complaint against the judge is filed with this court. So far as is pertinent here, only upon the filing of such a complaint is the record of a proceeding before the Commission placed in the public domain; only then does information concerning a proceeding before the Commission lose its confidential character.

Until a complaint is filed with this court, the proscription of the statute is applicable to punish any *person* who *divulges* any information concerning a proceeding before the Commission. Although Landmark is a corporation, by the force of Va. Code § 1-13.19,[5] it is a "person" within the meaning of Va. Code § 2.1-37.13. To "divulge" information means to disclose it or to make it known. *Black's Law Dictionary* 567 (4th ed. 1951). When Landmark published its article, it disclosed or made known to the public at large information which still was confidential.

The proscription of Va. Code § 2.1-37.13 is so clear that it would be unreasonable to construe the statute, as Landmark interprets it, to mean that only the participants in a Commission proceeding are subject to the prescribed sanctions or that only the first disclosure of confidential information is actionable. Clearly, Landmark's actions violated Va. Code § 2.1-37.13 and rendered it liable to imposition of the sanctions prescribed by the statute.

But, Landmark contends, to impose upon it the sanctions prescribed by Va. Code § 2.1-37.13 would unconstitutionally abridge its First Amendment guaranty of freedom of the press. This contention poses the serious question in the case and presents an issue not decided

[5] "§ 1-13.19. *Person.*—The word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

previously by this court or, so far as our research discloses, by any other appellate court in this country. The importance of the question is emphasized when it is considered that 34 jurisdictions in addition to Virginia, by constitutional provision, statute, or rule, require confidentiality of proceedings before bodies similar to our Judicial Inquiry and Review Commission.[6]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Clearly, "the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. ——, 49 L.Ed.2d 683, 696 (1976). Freedom of the press, however, is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). But when and under what circumstances a state may punish such an abuse is the difficult question, given the uncertainty created by the numerous decisions interpreting First Amendment rights.

From a review of the decisions of the United States Supreme Court involving restrictions upon First Amendment freedom of the press, it appears that the cases fall into three general categories: (1) denial of right of access to information; (2) prior restraint upon publication; and (3) subsequent punishment for publication. The

[6] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. American Judicature Society, *Judicial Disability and Removal Commissions, Courts and Procedures* (1973).

present case involves no denial of access; Landmark concedes that it has no greater constitutional right of access than the general public to information concerning Commission proceedings. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974).

While conceding that it is "difficult to determine whether the instant case is a 'prior restraint' or 'subsequent punishment' case," Landmark contends that Va. Code § 2.1-37.13 does impose a prior restraint upon publication. Prior restraints, Landmark asserts, bear a heavy presumption against their constitutional validity, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), and are permissible only (1) to protect the national security, (2) to prevent the publication of obscenity, and (3) to prohibit expression associated with situations which tend to incite acts of violence and the overthrow by force of government. *Near* v. *Minnesota*, 283 U.S. at 716. Because the publication in the present case does not fall within one of these exceptions, Landmark concludes, the prior restraint imposed by Va. Code § 2.1-37.13 is constitutionally impermissible.

We are of opinion, however, that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. Generally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review. Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 Notre Dame Lawyer 898 (1975-1976). A prior restraint "has an immediate and irreversible sanction." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. at ——, 49 L.Ed.2d at 697-98. By contrast, Va. Code § 2.1-37.13 seeks to preserve the confidentiality of Commission proceedings by providing for the imposition of criminal sanctions *after* the statute

has been violated. Thus, Virginia's proscription fits properly within the "subsequent punishment" category of cases.

The distinction between "prior restraint" and "subsequent punishment" is based upon "a theory deeply etched in our law," *viz.*, that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader —than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

But even though this may be a "subsequent punishment" case and not subject to the heavy presumption against invalidity, Landmark argues, it does not follow that publication of the article in question is punishable by the Commonwealth. In "subsequent punishment" cases, Landmark asserts, the Supreme Court's decisions require that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, opines Landmark, requires the state to prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest.

The governmental interest involved here, Landmark says, is the orderly administration of justice; the burden was upon the Commonwealth, therefore, to prove by "actual facts" that publication of the article in question created a clear and present danger to the administration of justice in Virginia. Because the Commonwealth failed to produce "actual facts" showing a clear and present danger, Landmark concludes, the judgment imposing the

sanction upon it is invalid under Supreme Court decisions interpreting the First Amendment.

Upon examination of the Supreme Court's decisions, we find that the "clear and present danger" standard was enunciated in *Schenck* v. *United States,* 249 U.S. 47 (1919). *Schenck* involved defendants charged with circulating printed matter alleged to constitute a violation of the Espionage Act of June 15, 1917. In defense, the First Amendment freedoms of speech and press were asserted. In the course of its opinion upholding the convictions, the Court stated:

> "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U.S. at 51-52.

Subsequently, in a series of decisions, the Supreme Court applied the "clear and present danger" test to cases in-

volving publications allegedly perilous to the orderly administration of justice. In *Bridges* v. *California*, 314 U.S. 252 (1941), *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), *Craig* v. *Harney*, 331 U.S. 367 (1947), and *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court reversed convictions for contempt based upon out-of-court comment concerning pending cases. In each instance, the Court held that the particular expression involved was insufficient to pose a clear and present danger to the orderly administration of justice and, therefore, was protected by the First Amendment.

Bridges defined the scope of the "clear and present danger" standard. There, the Court stated:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment . . . does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." 314 U.S. at 263.

It is upon *Bridges*, *Pennekamp*, *Craig*, and *Wood* that Landmark relies to support its assertion that before a state may punish expression, it must prove by "actual facts" the existence of a clear and present danger to the orderly administration of justice. *Bridges*, however, does not men-

tion any requirement of evidence to establish a clear and present danger. But in *Craig*, the Court analyzed *Bridges* to have held that:

> "[T]he compulsion of the First Amendment, made applicable to the States by the Fourteenth . . . forbade the punishment by contempt for comment on pending cases in absence of *a showing* that the utterances created a 'clear and present danger' to the administration of justice." 331 U.S. at 372 (emphasis added).

And, in *Pennekamp*, the Court stated:

> "For circumstances to create a clear and present danger to judicial administration, *a solidity of the evidence* should be required. . . ." 328 U.S. at 347 (emphasis added).

Finally, in *Wood*, after criticizing the trial court for "simply [adopting] as conclusions of law the allegations made in the contempt citation," 370 U.S. at 387, the Court stated:

> "Hence, in the absence of *some other showing* of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected." 370 U.S. at 389 (emphasis added).

We agree with Landmark that there is no evidence in the record favorable to the Commonwealth's position beyond the stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publi-

cation, the Commission had not filed a complaint with this court respecting the judge. And we agree that Landmark cannot be punished for publishing the confidential information contained in the article unless the revelation created a clear and present danger to a legitimate state interest—the orderly administration of justice. But we do not agree with Landmark that, because the Commonwealth did not produce other evidence by way of "actual facts" to show a clear and present danger, *Bridges, Pennekamp, Craig,* and *Wood* require reversal of the judgment of the trial court.

In our opinion, the present case differs substantially from *Bridges, Pennekamp, Craig,* and *Wood.* Those decisions involved the *common law power* of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. Necessarily, therefore, the imposition of sanctions in such circumstances was based, as the Court noted in *Bridges,* upon a "'concept of the most general and undefined nature.'" 314 U.S. at 260. Because the common law power of contempt is so general and undefined, the Court was concerned that, without evidence of a clear and present danger, fair public comment and criticism concerning a judge and the conduct of his judicial affairs would be "effectively discouraged." *Bridges,* 314 U.S. at 269.

By contrast, in the present case, the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, Va. Code § 2.1-37.13, and the substantive offense for which the punishment may be imposed is clear and well-defined. The restraint upon expression imposed by the statute is limited, and it is related solely to the purpose sought to be served by the legislation: the preservation of the confi-

dentiality of Commission proceedings. The statute does not seek to discourage any comment or criticism concerning a judge or the conduct of his judicial affairs save the disclosure of information resulting from a breach of the confidentiality of Commission proceedings.

Virginia Code § 2.1-37.13 represents a legislative declaration by the General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. We believe this legislative declaration elevates the restriction upon speech and press involved in this case to a level of legal dignity not enjoyed by the contempt judgments involved in *Bridges, Pennekamp, Craig,* and *Wood.* Indeed, in *Wood,* which involved a Georgia contempt proceeding, the Supreme Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements . . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

And, in *Bridges,* which involved a California contempt proceeding, the Supreme Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending

> case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection'." 314 U.S. at 260-61.

As we have noted, the imposition of punishment upon Landmark in this case does not depend upon some undefined concept of judicial authority. Instead, the sanction imposed springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest[7] that

[7] *Cf. Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), a case involving a civil action for breach of privacy. The Supreme Court held that the First Amendment protected the revelation in a television broadcast of the name of a rape victim, although the disclosure was violative of a Georgia statute which made it a misdemeanor to publish or broadcast the name. The news reporter, however, had obtained the victim's name from the indictment in the criminal case, which was a public record made available to the reporter for his inspection. The Court stated:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495.

it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable. Accordingly, we believe the judgment imposing the sanction in this case is fortified against Landmark's constitutional attack because it is "encased in the armor wrought by prior legislative deliberation," and it is strengthened further by the requirement of the Virginia Constitution that proceedings before the Commission "shall be confidential."

We must note, however, that in the *Bridges* opinion the Supreme Court did observe: "even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." 314 U.S. at 263. But we believe the matters which, in the first place, prompted creation of the Judicial Inquiry and Review Commission, dictated the requirement of the Virginia Constitution that proceedings of the Commission "shall be confidential," and necessitated the enactment of the sanctions prescribed by Va. Code § 2.1-37.13, are much more than "minor matters of public inconvenience or annoyance." They are matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Judicial Inquiry and Review Commission. And they are matters upon which courtroom evidence is unnecessary to sustain their truth and validity.

History tells us that the methods of dealing with disabled or unfit judges by legislative impeachment[8] or re-

[8] Section 54 of the Constitution of 1902 (Article IV, Section 17 of the Constitution of 1971).

moval,[9] existing prior to creation of the Commission, were seldom used and generally unsatisfactory. The inadequacies of those methods prompted inquiry into other means of handling problem judges. Led by California, numerous jurisdictions have created commissions or other bodies to investigate complaints against judges. Along with Virginia, many of the jurisdictions have imposed requirements of confidentiality in commission proceedings. Note 6, *supra*.

The necessity for confidentiality of commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia* 764 (1974).

The California experience furnishes support for the confidentiality of commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct . . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

[9] Section 104 of the Constitution of 1902 (omitted from the new constitution).

Florida requires confidentiality of proceedings before its Judicial Qualifications Commission, the counterpart of our Judicial Inquiry and Review Commission. In discussing the Commission, the Florida Supreme Court has stated:

> "The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges . . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within

the system." *Forbes* v. *Earle*, 298 So.2d 1, 4 (Fla. 1974).

Thus, the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious.

Considering these matters, we believe it can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commisison could not function properly or discharge effectively its intended purpose. Thus sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice.

The ultimate and real concern in this type of case is exemplified by a statement in *Pennekamp* v. *Florida:*

> "[R]eviewing courts are brought in cases of this type to appraise the [press] comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." 328 U.S. at 336.

We recognize the public interest in information pertaining to judicial discipline and in free debate upon the con-

duct of the judiciary. *See Wood* v. *Georgia*, 370 U.S. at 392. We find, however, that the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission. When a complaint is filed with this court, the entire record of the Commission's proceedings becomes public. And, as we have noted previously, the statute does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs.

On balance, therefore, we find that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of public disclosure of the Commission's proceedings prior to the filing of a complaint with this court. Accordingly, we affirm the judgment of the trial court.

Affirmed.

POFF, *J.*, dissenting.

I dissent. The judgment should be reversed and final judgment should be entered for the defendant. In my view, the statute should be construed not to apply to this defendant under these circumstances. Construed otherwise, the statute offends the First Amendment.

As the parties agree and the majority recognize, there is utterly no evidence of record showing a "clear and present danger". The majority simply conclude that the General Assembly concluded that there was a danger so clear and present as to justify a statutory abridgement of the right to publish. The majority reach their conclusion unaided by legislative history and without benefit of a declaration of such danger in the statute or the Constitution which mandates the statute. Just as a court

cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, *Wood* v. *Georgia,* 370 U.S. 375 (1962), a court cannot infer the existence of a clear and present danger from the mere enactment of a penal statute.

If a restriction upon publication of lawfully-acquired information concerning the proceedings of a commission reviewing charges against a judicial officer can be constitutionally justified by a simple conclusion that publication poses a clear and present danger to the administration of justice, a similar conclusion could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator.

I simply believe that, in order to justify a statutory exception to the constitutional guarantee, there must be an *evidentiary* showing of a clear and present danger to a legitimate governmental interest, and an evidentiary showing that the statutory sanction is the minimum necessary to meet that danger and protect that interest. The legal presumption is in favor of the First Amendment and against the exception, and legal presumptions survive until rebutted by evidence.

APPENDIX B

Order Finding Landmark Guilty as Charged

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 15th day of January, in the year 1976.

• • • • •

This day again came Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, in the person of its representative, Glen Hampton, and came as well the Attorney of the Commonwealth in the person of Joseph H. Campbell and the Attorney for the Accused in the person of Conrad M. Shumadine, pursuant to continuance order entered on the 10th day of December 1975; and it appearing to the Court that the accused was tried on the 10th day of December 1975 on a misdemeanor indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, and the matter of a finding having been taken under advisement, and now being fully heard and determined by the Court; the Court doth find the defendant Guilty as charged in the said misdemeanor indictment and doth fix punishment at a fine in the sum of five hundred dollars ($500.00) and that the defendant be required to pay the costs of prosecution.

APPENDIX C

Statutes Involved

Chapter 4.1.

Judicial Inquiry and Review Commission.

Article 1.

General Provisions.

§ 2.1-37.1. Definitions and application of chapter.—As used in this chapter, *"Commission"* means the Judicial Inquiry and Review Commission provided for in § 10 of Article VI of the Constitution, *"subordinate courts of record"* means all courts of record except the Supreme Court, and *"judge"* means a justice of the Supreme Court, judge of a subordinate court of record, judge of a court not of record, member of the State Corporation Commission, or a member of the Industrial Commission of Virginia, all of whom shall be subject to investigations and proceedings under the provisions of this chapter. (1971, Ex. Sess., c. 154.)

§ 2.1-37.2. Jurisdiction of Supreme Court.—In addition to the jurisdiction conferred on the Supreme Court by § 1 and § 10 of Article VI of the Constitution, to conduct hearings and impose sanctions upon the filing by the Commission of complaints against justices of the Supreme Court, judges of other courts of record, and members of the State Corporation Commission, the Supreme Court by virtue of this chapter shall have the same jurisdiction, to be exercised in the same manner, upon the filing by the Commission of complaints against all other judges as defined herein. (1971, Ex. Sess., c. 154.)

§ 2.1-37.3. Commission created; membership and terms of office.—There is hereby created a Judicial Inquiry and Review Commission, composed of five persons who shall be citizens and residents of this Commonwealth. The members of the Commission shall be chosen by the vote of a majority of the members elected to each house of the General Assembly. The Commission, annually, shall elect one of its members to be chairman of the Commission for the ensuing year.

The Commission shall consist of two judicial members, who shall be active judges of subordinate courts of record; two lawyer members, who shall be active members of the Virginia State Bar who are not judges and who have practiced law in this State for fifteen or more years immediately preceding their appointment; and one public member who shall not be an active or retired judge and shall never have been a licensed lawyer.

The term of office of each member shall be four years commencing on July first, except that the initial terms commencing on July first, nineteen hundred seventy-one shall be as follows: the term of one lawyer member shall be one year; the term of the public member shall be two years; the term of one judicial member shall be two years; the term of one lawyer member shall be three years; and the term of one judicial member shall be four years. No member of the Commission shall be eligible to serve more than two consecutive terms.

Commission membership terminates whenever a member resigns or ceases to possess the qualifications that made him eligible for appointment. During any vacancy which may exist while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly. Upon election of a successor by the General Assembly, the new member of the Commission

shall serve for the remainder of the term of office of his predecessor.

Any member of the Commission who is the subject of an investigation or hearing by it or is otherwise personally involved therein shall be disqualified by the Commission from acting in such proceedings. In such a case the Governor shall appoint a person possessing the original qualifications of such member as prescribed by this section to serve temporarily as a substitute member of the Commission in such proceedings. (1971, Ex. Sess., c. 154.)

§ 2.1-37.4. Powers and duties of Commission generally.—The Commission is hereby vested with the power, and it shall be its duty, to investigate charges arising out of the present or any prior term of office which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution and the provisions of this chapter even though the subject judge may have been reelected to a new term of office.

The Commission, after such investigation as it deems necessary, may order and conduct hearings at such times and places in the State as it shall determine.

If the Commission finds the charges to be well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge, it may file a formal complaint before the Supreme Court. (1971, Ex. Sess., c. 154.)

§ 2.1-37.5. Power to make rules.—The Commission shall have the authority to make rules, not in conflict with the provisions of this chapter or of general law, to govern investigations and hearings conducted by it. (1971, Ex. Sess., c. 154.)

§ 2.1-37.6. Concurrence of majority in acts of Commission required.—No act of the Commission shall be valid

unless concurred in by a majority of its members. (1971, Ex. Sess., c. 154.)

§ 2.1-37.7. Officers and employees; experts and reporters; witnesses; legal counsel.—The Commission may employ such officers, assistants, and other employees as it deems necessary for the performance of the duties and exercise of the powers conferred upon it, may arrange for and compensate medical and other experts and reporters, may arrange for attendance of witnesses, including witnesses not subject to subpoena, and may pay from funds available to it all expenses reasonably necessary for effectuating the purposes of § 10 of Article VI of the Constitution and the provisions of this chapter, whether or not specifically enumerated herein. The Attorney General shall, if requested by the Commission, act as its counsel generally or in any particular investigation or proceeding.

The Commission may employ special counsel from time to time when it deems such employment necessary, notwithstanding the provisions of § 2.1-122 of the Code of Virginia, as amended.

The Executive Secretary to the Supreme Court shall serve as Executive Secretary to the Commission and shall receive all charges brought to the Commission and shall perform such other duties as may be assigned by the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.8. Compensation and expenses.—Each member of the Commission shall be allowed his necessary expenses for travel, board, and lodging incurred in the performance of his duties. The two judicial members shall not receive any compensation for their services, but the public member and the two lawyer members shall each receive compensation of fifty dollars per diem for each day of his attendance upon any meeting of the Commission. These and

all other necessary expenses of the Commission shall be paid by the Commonwealth. (1971, Ex. Sess., c. 154.)

ARTICLE 2.

Investigations and Hearings.

§ 2.1-37.9. Oaths; inspection of books and records; subpoenas.—In the conduct of investigations and formal hearings, the Commission may (a) administer oaths and affirmations; (b) order and otherwise provide for the inspection of books and records; and (c) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and other records or tangible evidence relevant to any such investigation or formal hearing.

The power to administer oaths and affirmations, to issue subpoenas, or to make orders for or concerning the inspection of books and records may be exercised by any member of the Commission, unless the Commission shall otherwise determine. (1971, Ex. Sess., c. 154.)

§ 2.1-37.10. Scope of process.—In any investigation or formal proceeding in any part of the State, any process issued pursuant to the provisions of § 2.1-37.9 shall be effective throughout the Commonwealth. (1971, Ex. Sess., c. 154.)

§ 2.1-37.11. Order compelling witness to attend and testify.—If any person refuses to attend or testify or produce any writings or things required by any such subpoena, the Commission may petition any court of record in the Commonwealth for an order compelling such person to attend and testify or produce the writings or things required by the subpoena before the Commission. The court shall order such person to appear before it at a specified time

and place and then and there show cause why he had not attended or testified or produced the writings or things as required. A copy of the order shall be served upon him. If it appears to the court that the subpoena was regularly issued, the court shall order such person to appear before the Commission at the time and place fixed in the order and testify or produce the required writings or things. Upon failure to obey the order, such person shall be dealt with by such court as for contempt of court.

All process in any such case may be served in the manner prescribed by law for service of process in civil actions. (1971, Ex. Sess., c. 154.)

§ 2.1-37.12. Depositions.—In any pending investigation or formal hearing, the Commission may order the deposition of a person residing within or without the State to be taken in such form and subject to such limitations as may be perscribed in the order. If the subject judge and counsel for the Commission do not stipulate as to the manner of taking the deposition, either the judge or counsel for the Commission may file in a trial court of record a petition entitled "In the Matter of Proceeding of Judicial Inquiry and Review Commission No. ..... (state number)" and stating generally, without identifying the judge, the nature of the pending matter, the name and residence of the person whose testimony is desired, and directions, if any, of the Commission, asking that an order be made requiri ; such person to appear and testify before a designated officer. Upon the filing of the petition, the court may make an order requiring such person to appear and testify. A subpoena for such deposition shall be issued by the clerk of the court and the deposition shall be taken and returned, in the manner perscribed by law for depositions in civil actions. Upon failure of the person named in the subpoena to appear and testify, he shall be dealt

with by such court as for contempt of court. If the deposition is that of a person residing or present within this State, the petition shall be filed in the court of record of the county or corporation in which such person resides or is present; otherwise in the Circuit Court of the city of Richmond. (1971, Ex. Sess., c. 154.)

§ 2.1-37.13. Confidentiality of papers and proceedings.—All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor. (1971, Ex. Sess., c. 154.)

§ 2.1-37.14. Privilege.—The filing of papers with and the giving of testimony before the Commission shall be privileged, except where such filing of papers or giving of testimony is motivated or accompanied by actual malice. No other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the Commission with the Supreme Court, in support of a formal complaint filed therewith, continues to be privileged and (b) a writing which was privileged before its filing with the Commission does not lose such privilege by such filing. (1971, Ex. Sess., c. 154.)

§ 2.1-37.15. Witness fees; mileage.—Each witness, other than an officer or employee of the Commonwealth or a political subdivision thereof, or an officer or an employee of a court of this Commonwealth, shall receive for his attendance the same fees and all witnesses shall receive the same mileage allowed by law to a witness in civil cases. The amount shall be paid by the Commission from funds appropriated for the use of the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.16. Costs.—No award of costs shall be made in any proceeding before the Commission or the Supreme Court. (1971, Ex. Sess., c. 154.)

Article 3.

Cooperation of Public Officers and Agencies.

§ 2.1-37.17. Assistance and information.—State and local public bodies and departments, officers and employees thereof, and officials and all personnel of the courts of this Commonwealth shall cooperate with and give reasonable assistance and information to the Commission and any authorized representative thereof, in connection with any

investigations or proceedings within the jurisdiction of the Commission. (1971, Ex. Sess., c. 154.)

§ 2.1-37.18. Service of process; execution of orders.—It shall be the duty of the sheriffs and sergeants in the several counties, cities, and towns, upon request of the Commission or its authorized representative, to serve process and execute all lawful orders of the Commission or entered by the court at its request without costs therefor. (1971, Ex. Sess., c. 154.)

APPENDIX D

News Article of October 4, 1975, *The Virginian-Pilot*

(See Opposite) ☞

Possible Discipline

Hearing Held About Judge

By STEVE GOLDBERG

Virginian-Pilot Staff Writer

NORFOLK — A formal hearing concerning possible disciplinary action against Juvenile and Domestic Relations Court Judge H. Warrington (Spike) Sharp was held early last month.

The two-day hearing at Holiday Inn-Scope, conducted by members of the state Judicial Inquiry and Review Commission, apparently stemmed from charges of incompetence against the 55-year-old judge.

No formal complaint has been filed by the commission against Sharp, indicating either that the five-man panel found insufficient cause for action or that the case is still under review.

No commission member would say which is the case.

The review board is the state's most serious mechanism for policing judicial conduct. Its decision to press a formal complaint to the State Supreme Court could lead to retirement, censure, or removal from office.

Hearings and subsequent deliberation are conducted in strict secrecy since it is a misdemeanor to reveal commission actions.

Nevertheless, a number of local lawyers have confirmed privately since the first week of September that the hearing did take place. It is the first such investigation held here since the board was created in 1973, several said.

Sharp himself replied, "No comment" to a series of questions about the procedure.

Reno S. Harp III, deputy attorney general, headed the prosecution, sources said. Lawyer William L. Ward defended Sharp. The session stretched to two days. Otherwise, few details are known.

Most sources indicate general competence was the issue in question, although no one disclosed the specific charges. "It was more a melange of general complaints," said a lawyer subpoenaed to appear at the hearing.

Judge Sharp

Another source said that complaints from both citizens and lawyers were aired.

A typical response came from one assistant Commonwealth's attorney, identified as a witness at the hearing. "I can't even acknowledge that I know what you're talking about," he said. "And don't you dare tell anyone I've even talked to you."

All review board procedures are to be confidential unless charges (reviewed at a hearing) are held to be well-founded. If that happens, a formal complaint may be filed with the State Supreme Court and a hearing conducted in open court.

There are five commission members: Thomas L. Phillips of Lynchburg and Fred Bateman of Newport News, both lawyers; Judges Franklin Backus of Alexandria and Ernest W. Ballou of Roanoke; and Dr. George M. Modlin, retired chancellor of the University of Richmond. Modlin is chairman.

According to Harp, the commission has brought a recommendation to the State Supreme Court only once. That came in the case of Radford Circuit Court Judge Southall Jordan, who was subsequently censured for representing his son in General District Court on two separate traffic charges.

See Hearing, Page B4)

Hearing on Judge

Continued from Page B1

No commission member would confirm that action has been completed, or is still pending in the Sharp case. (The group's next regular meeting is scheduled for Oct. 17.)

Anyone — lawyer, fellow judge, or individual citizen — can lodge a complaint with the Inquiry and Review Commission. Conduct or mental and physical competence may be questioned. One lawyer noted that the board was originally viewed by many legislators as a mechanism for replacing judges who had become senile or otherwise impaired.

Commission member Bateman said that if a judge is determined to be disabled, he may retire with full benefits. If he is removed for incompetence, retirement and other benefits are lost.

Once a complaint is filed, an investigator (commission staff includes one lawyer and one nonlawyer) or a commission member is sent to explore the charge.

A Norfolk lawyer said he was visited in late June or early July by a special investigative officer "who asked a lot of questions (about Sharp)."

The man was later called as a witness.

If evidence is deemed sufficient, a formal hearing such as the one in Norfolk is held. According to Bateman, the commission holds hearings about 15 to 20 days each year. Perhaps half a dozen of those are considered formal.

When asked why only one case had ever been referred to the Supreme Court, Bateman said, "Several (judges) did resign . . . A number have retired or something like that."

Sharp, a Norfolk County native, became an associate judge in Juvenile and Domestic Relations Court in 1960, succeeding Alfred W. Whitehurst.

He was reappointed to six-year terms in 1967 and 1973, following unanimous votes of the Circuit Court judges.

Under judicial reform legislation passed in 1973, the procedure for selecting lower court judges was altered. The General Assembly assumed responsibility for their election.

Judges were given the option of continuing their term or going before the legislature for reappointment. Most judges, including Sharp, chose the latter route.

No complaints were logged against him during legislative hearings conducted then, one local legislator said. Sharp's present term will expire in January 1980.

APPENDIX E

Order of United States District Court for the Eastern District of Virginia

(See Opposite) ☞

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Nationwide Communications, Inc., et al,

Plaintiffs,

vs.

C.A. No. 77-0139-R

The Honorable Franklin P. Backus, et al,

Defendants.

FILED

MAR 15 1977

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ORDER

For the reasons stated from the bench, and good cause having been shown, it is hereby ORDERED that the defendants Davis and Jones are temporarily enjoined from prosecuting plaintiffs, under Virginia Code Section 2.1-37.13. for broadcasting information relating to a pending investigation of the Virginia Judicial Inquiry and Review. This injunction shall expire within ten days of this date, unless sooner modified, extended or dissolved.

This injunction becomes effective upon the posting of bond in the amount of $500.00, which may be made by personal surety.

Enter:

Robert R. Merhige, Jr.

Judge

6:07 P.M.

March 15, 1977

A TRUE COPY-TESTE:
CLERK, U.S. DISTRICT COURT
BY: Angela P. Carmel.
DEPUTY CLERK

APPENDIX F

Notice of Appeal

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 76-0596

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Landmark Communications, Inc. ("Landmark"), hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia entered on March 4, 1977 upholding the constitutionality of Va. Code § 2.1-37.13 and affirming the conviction of Landmark for violating Va. Code § 2.1-37.13.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ CONRAD M. SHUMADINE
Conrad M. Shumadine
David Y. Faggert
KAUFMAN, OBERNDORFER and SPAINHOUR
2030 Virginia National Bank Bldg.
Norfolk, Virginia 23510
Counsel for Appellant

Certificate of Service

I hereby certify, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail the 15th day of April, 1977, upon the following:

Anthony F. Troy
Attorney General
James E. Kulp
Assistant Attorney General
900 Fidelity Building
230 East Main Street
Richmond, Virginia 23219

/s/ CONRAD M. SHUMADINE
Conrad M. Shumadine